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14 Attorneys for Defendant INDYMAC BANCORP, INC.  
15 and the Federal Deposit Insurance Corp., as Receiver for  
16 Defendant INDYMAC BANK, F.S.B.

17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 **CV08-05723**

20 **MMM**

21 **(AGRx)**

22 JOEL RIVERA, an individual on behalf  
23 of himself and all others similarly  
24 situated,

25 Plaintiffs,

26 vs.

27 INDYMAC BANCORP, INC., a  
28 Delaware corporation; FEDERAL  
DEPOSIT INSURANCE  
CORPORATION, as Receiver for  
INDYMAC BANK, F.S.B.; and DOES 1  
through 100, inclusive,

Defendants.

Case No.

**NOTICE OF REMOVAL**

**NOTICE OF REMOVAL**

Pursuant to 12 U.S.C. § 1819(b)(2)(B) and 28 U.S.C. § 1441, the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for IndyMac Bank, F.S.B. ("FDIC-R"), hereby removes the above-captioned lawsuit from the Superior Court California, County of Los Angeles – Central District, in which it currently is pending,

**NOTICE OF REMOVAL**

DYKEMA GOSSETT LLP  
333 SOUTH GRAND AVENUE  
SUITE 2100  
LOS ANGELES, CALIFORNIA 90071

2008 SEP - 2 PM 12:48  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

FILED

1 to the United States District Court for the Central District of California. As grounds  
2 for the removal of this case, FDIC-R states as follows:

### 3 **BACKGROUND**

4 1. Plaintiff Joel Rivera filed a putative class action in Case No. BC 378843  
5 in the Superior Court of California, County of Los Angeles – Central District, seeking  
6 recovery of damages and injunctive relief based on allegations that defendant failed  
7 to properly disclose a prepayment penalty and yield spread premium in connection  
8 with a home mortgage loan it made to plaintiff.

9 2. On July 11, 2008, IndyMac Bank, F.S.B., Pasadena, California  
10 (“IndyMac”) was closed by the Office of Thrift Supervision (“OTS”) and the Federal  
11 Deposit Insurance Corporation was appointed as receiver (the “Receiver”). A true and  
12 correct copy of the OTS’s Order appointing the FDIC as Receiver for IndyMac is  
13 attached hereto as Exhibit 1.

14 3. FDIC-R has succeeded to all rights, titles, and powers and privileges of  
15 IndyMac, pursuant to 12 U.S.C. § 1821 (c)(3)(A). As such, FDIC-R stands in the  
16 shoes of IndyMac with respect to all matters.

17 4. On or about August 11, 2008, pursuant to the stipulation of the parties,  
18 the Superior Court entered an Order substituting FDIC-R for IndyMac as the Real  
19 Party in Interest. A copy of the Order reflecting the substitution of FDIC-R as a party  
20 to the State Court action is attached as Exhibit 2.

### 21 **BASIS FOR REMOVAL**

22 5. The case is removable pursuant to 28 U.S.C. § 1441(b) which provides  
23 in relevant part:

24 Any civil action of which the district courts have original  
25 jurisdiction founded on a claim or right arising under the  
26 Constitution, treaties or laws of the United States shall be  
removable without regard to the citizenship or residence of  
the parties.

27 6. Any civil suit in which the FDIC, in any capacity, is a party is “deemed  
28 to arise under the laws of the United States.” 12 U.S.C. § 1819(b)(2)(A); *see also*

1 *Bullion Services, Inc. v. Valley State Bank*, 50 F.3d 705 707 (9<sup>th</sup> Cir. 1995). When  
 2 the FDIC is a party, the entire action is deemed to arise under the laws of the United  
 3 States. *Buchner v. FDIC*, 981 F.2d 816, 819 (5<sup>th</sup> Cir. 1993).

4 7. Further, the FDIC has a statutory right to remove cases in which it is a  
 5 party from state court to federal court pursuant to the Financial Institution Reform,  
 6 Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 209, 103 Stat. 183 *et*  
 7 *seq.* Specifically, 12 U.S.C. § 1819(b)(2)(B) provides in pertinent part:

8 (B) Removal

9 Except as provided in subparagraph (D), the Corporation  
 10 may, without bond or security, remove any action, suit, or  
 11 proceeding from a State court to the appropriate United  
 12 States district court before the end of the 90-day period  
 beginning on the date of the action, suit, or proceeding is  
 filed against the Corporation or the Corporation is  
 substituted as a party.

13 8. The instant Notice of Removal is being brought within the 90-day period  
 14 from the date FDIC-R was substituted as a party in the State Court action.

15 9. Because FDIC-R is now a party to the State Court action, the entire State  
 16 Court action must be removed to the United States District Court for the Central  
 17 District of California.

18 10. FDIC-R has promptly served notice of the filing of this removal to all  
 19 parties of record in the State Court action, and to the Clerk of the Superior Court of  
 20 California, County of Los Angeles – Central District, pursuant to 28 U.S.C. §  
 21 1446(d).

22 11. Venue properly lies with this Court pursuant to 28 U.S.C. § 1441(a) and  
 23 1446(a), as this action is presently pending in the Los Angeles Superior Court.

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1 12. A copy of all process, pleadings and orders served by or upon FDIC-R is  
2 attached to this Notice of Removal as Exhibits 3-5 as required by 28 U.S.C. §  
3 1446(a).

4 Respectfully submitted,

5 Dated: September 2, 2008

DYKEMA GOSSETT LLP

6  
7 By: Thomas M. Hanson  
8 Thomas M. Hanson  
9 Attorneys for the Federal Deposit  
10 Insurance Corporation, as Receiver for  
11 Indymac Bank, F.S.B.

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LOS ANGELES, CALIFORNIA 90071

# EXHIBIT 1

**OFFICE OF THRIFT SUPERVISION****Pass-Through Receivership Of A Federal Savings Association  
Into A De Novo Federal Savings Association  
That is Placed Into Conservatorship  
With the FDIC****Date: July//, 2008****Order No.: 2008-24**

The Director of the Office of Thrift Supervision ("OTS"), or his designee, in cooperation with the Federal Deposit Insurance Corporation ("FDIC"), has determined: (1) to appoint the FDIC as receiver for the savings association specified below ("OLD THRIFT"); (2) to approve the FDIC's request for the issuance of a new federal mutual savings association charter ("NEW THRIFT") as a successor to OLD THRIFT; (3) to approve the transfer of such assets and liabilities of OLD THRIFT to its successor NEW THRIFT, as the FDIC has determined to be appropriate; and (4) to appoint the FDIC as conservator of NEW THRIFT. Collectively, numbers 2 through 4 of the foregoing are referred to herein as the "APPLICATIONS."

"OLD THRIFT," refers to:

| <u>Name</u>          | <u>Location</u>       | <u>OTS No.</u> |
|----------------------|-----------------------|----------------|
| IndyMac Bank, F.S.B. | Pasadena, California. | 03970          |

**I. GROUNDS FOR ACTIONS TAKEN IN THIS ORDER:****RECEIVERSHIP;  
GROUNDS FOR APPOINTMENT OF FDIC AS  
RECEIVER FOR OLD THRIFT**

The Director, or his designee, based upon the administrative record finds and determines that:

OLD THRIFT has insufficient cash and liquid assets convertible to cash necessary to pay the expected withdrawal demands of its depositors. OLD THRIFT has suffered significant deposit outflows, exceeding \$1 billion since June 26, 2008, in part because of adverse publicity. Further, because OLD THRIFT is not well capitalized, it cannot renew its large volume of brokered deposits, which will create an additional deposit outflow. In addition, OLD THRIFT has limited and diminishing liquidity sources available to it. There has been significant disruption in the markets for the types of assets, mortgage backed securities and mortgage servicing rights, held by OLD THRIFT. Therefore, those

assets that are not already subject to liens may not be marketable or only can be sold at prices that would result in OLD THRIFT failing to meet its capital requirements. Moreover, OLD THRIFT's mortgage servicing rights are the major source of OLD THRIFT's current earnings. In addition, the consequences of OLD THRIFT's top-tier holding company's July 7, 2008 public disclosure of adverse information, and the curtailment of forward mortgage lending and resulting downsizing, place OLD THRIFT in a precarious position and OLD THRIFT has been unable to find anyone who is willing and able to invest sufficient capital to alleviate its problems.

OLD THRIFT has suffered losses amounting to approximately \$842 million from the third quarter of 2007 to the first quarter of 2008 and projects to report another \$354 million loss for the second quarter of 2008. OLD THRIFT is in an unsafe and unsound condition as a result of its severe liquidity strain, deteriorating asset quality, continuing significant negative operating earnings, and declining capital with no realistic prospects for raising capital to ensure that it can repay all of its liabilities, including deposits.

OLD THRIFT has been unsuccessful in its attempts to find investors who are willing and able to recapitalize OLD THRIFT, given OLD THRIFT's current financial condition, ongoing deposit outflows, lack of liquidity, and continued asset quality deterioration. Further, OLD THRIFT projected that it would be undercapitalized as of June 30, 2008. In addition to other asset write-down's which OLD Thrift should be taking, OLD THRIFT is likely to be unable to meet its depositors' demands and other obligations in the normal course of business, and therefore, OLD THRIFT should immediately recognize additional losses on assets held for sale. The losses OLD THRIFT should recognize will result in OLD THRIFT being classified as undercapitalized. Moreover, because efforts to raise capital have proven unsuccessful, there is no reasonable prospect of OLD THRIFT becoming adequately capitalized without Federal assistance.

Therefore, the Director, or his designee, has concluded that:

- (a) OLD THRIFT is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business because it does not have sufficient liquid assets to fund expected withdrawals;
- (b) OLD THRIFT is in an unsafe and unsound condition to transact business due to its lack of capital and its illiquid condition;
- (c) OLD THRIFT is undercapitalized as defined in section 38(b) of the FDIA, and has no reasonable prospect of becoming adequately capitalized as defined in section 38(b) of the FDIA.

The Director, or his designee, therefore, has determined that grounds for the appointment of a receiver for OLD THRIFT exist under section 5(d)(2) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1464(d)(2) and section 11(c)(5) of the FDIA, 12 U.S.C. § 1821(c)(5).



**TRANSFER INTO A NEW FEDERAL CHARTER:**  
**GROUND FOR ISSUANCE OF NEW FEDERAL CHARTER AND**  
**APPROVAL OF TRANSFER OF ASSETS AND LIABILITIES OF**  
**OLD THRIFT TO NEW THRIFT**

The FDIC, as receiver of OLD THRIFT, has applied for authority to organize a new Federal mutual savings association, NEW THRIFT, that is to take over such assets and such liabilities of OLD THRIFT as the FDIC has determined to be appropriate, pursuant to section 11(d)(2)(F)(i) of the FDIA, 12 U.S.C. §1821(d)(2)(F)(i). The FDIC would insure the accounts of NEW THRIFT.

The Director, or his designee: (i) has considered the factors set forth in section 5(e) of HOLA, 12 U.S.C. § 1464(e), with regard to granting a new federal savings association charter, has determined that the charter should be issued, that NEW THRIFT is authorized to transact business as a savings association, and that the charter and bylaws to be issued for NEW THRIFT are in a form consistent with the material provisions of the applicable regulations; and (ii) has considered the factors set forth in section 18(c) of the FDIA, 12 U.S.C. § 1828(c), and 12 C.F.R. § 563.22 with respect to the acquisition of certain assets and assumption of certain liabilities of OLD THRIFT by NEW THRIFT. Immediate action is necessary given the seriously adverse financial condition of OLD THRIFT and in order to permit NEW THRIFT to acquire certain assets and assume certain liabilities of OLD THRIFT and continue to serve OLD THRIFT's community and customers.

For the foregoing reasons, the Director, or his designee, has determined that, pursuant to 12 C.F.R. §§ 563.22 (e) and 543.7-1, public notice of the APPLICATIONS shall not be required. In addition, the Director, or his designee, finds that OTS must act immediately in order to prevent the probable default of OLD THRIFT. Therefore, the publication of notice required by section 18(c)(3) of the FDIA, the reports on the competitive factors of the acquisition required by section 18(c)(4) of the FDIA, and the delayed consummation required by section 18(c)(6) of the FDIA, shall be dispensed with. Accordingly, NEW THRIFT may immediately acquire the assets and assume the liabilities determined to be appropriate by the FDIC.

**CONSERVATORSHIP:**

**GROUND FOR APPOINTMENT OF FDIC AS**  
**CONSERVATOR FOR NEW THRIFT**

The FDIC has indicated that, immediately upon the completion of the organization of NEW THRIFT (which will be federally chartered) and completion of the transfer of the aforesaid assets and liabilities of OLD THRIFT to NEW THRIFT, it will, in the exercise of its authority to act as the board of directors of NEW THRIFT pursuant to section 11(d)(2)(B) of the FDIA, 12 U.S.C. § 1821(d)(2)(B), consent to the OTS



appointing the FDIC as conservator for NEW THRIFT. Moreover, NEW THRIFT will have virtually the same capital and liquidity as OLD THRIFT had immediately prior to the appointment of a receiver for OLD THRIFT and, therefore, the grounds set forth in Section I above for appointment of the receiver for OLD THRIFT, are also applicable as grounds for the appointment of a conservator for NEW THRIFT.

## **II. ACTIONS ORDERED OR APPROVED:**

### **APPOINTMENT OF A RECEIVER**

The Director, or his designee, hereby appoints the FDIC as receiver for OLD THRIFT, for the purpose of liquidation, pursuant to section 5(d)(2) of HOLA, 12 U.S.C. § 1464(d)(2), and section 11(c)(6)(B) of the FDIA, 12 U.S.C. § 1821(c)(6)(B).

### **ISSUANCE OF A FEDERAL CHARTER AND APPROVAL OF THE PASS-THROUGH OF ASSETS AND LIABILITIES**

The Director, or his designee, hereby approves: (1) the application of the FDIC to organize NEW THRIFT as a federal mutual savings association (and hereby authorizes the issuance of an appropriate charter and bylaws for NEW THRIFT in form and content approved by the Chief Counsel's Office); (2) the transfer of such assets and liabilities of OLD THRIFT to its successor, NEW THRIFT, as the FDIC has determined to be appropriate; and (3) the retention of the home and branch offices of OLD THRIFT by its successor, NEW THRIFT. Prior to the appointment or election of a board of directors for NEW THRIFT, the FDIC may, in addition to any other powers granted by applicable law, exercise the powers of the board of directors pursuant to section 11(d)(2)(B) of the FDIA, 12 U.S.C. § 1821(d)(2)(B).

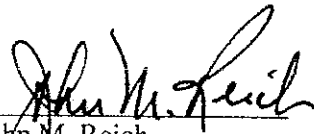
### **APPOINTMENT OF A CONSERVATOR FOR NEW THRIFT**

The Director, or his designee, hereby appoints the FDIC as conservator for NEW THRIFT pursuant to sections 5(d)(2)(A) and (E) of the HOLA, 12 U.S.C. §§ 1464(d)(2)(A), 1464(d)(2)(E), effective upon receipt of the consent of NEW THRIFT to such appointment. That consent must be contained in a resolution of its board of directors issued by the FDIC in exercise of its power, as the organizer of NEW THRIFT, to act as its interim board of directors pursuant to section 11(d)(2)(B) of the FDIA, 12 U.S.C. § 1821(d)(2)(B).

**DELEGATION OF AUTHORITY TO ACT FOR OTS**

The Director, or his designee, hereby authorizes the OTS West Region Director, or his designee, and the Deputy Chief Counsel for the Business Transactions Division of the Chief Counsel's office, or his designee, to: (1) certify orders; (2) sign, execute, attest or certify other documents of OTS issued or authorized by this Order; (3) designate the person or entity that will give notice of the appointment of a receiver for OLD THRIFT and serve OLD THRIFT with a copy of this Order pursuant to 12 C.F.R. § 558.2; (4) designate the person or entity that will give notice of the appointment of a conservator for NEW THRIFT and serve NEW THRIFT with a copy of this Order pursuant to 12 C.F.R. § 558.2; and (5) perform such other functions of OTS necessary or appropriate for implementation of this Order. All documents to be issued under the authority of this Order must be first approved, in form and content, by the Chief Counsel's Office. In addition, the Director, or his designee, hereby authorizes the Deputy Chief Counsel for the Business Transactions Division of the Chief Counsel's office, or his designee, to make any subsequent technical corrections, that might be necessary, to this Order or any documents issued under the authority of this Order.

By Order of the Director of OTS, effective July 11, 2008.

  
John M. Reich  
Director

# **EXHIBIT 2**

COPY

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and the Federal Deposit Insurance Corp., as Receiver for  
Defendant INDYMAC BANK, F.S.B.

**ORIGINAL FILED**

AUG 12 2008

**LOS ANGELES  
SUPERIOR COURT**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

JOEL RIVERA, an individual on behalf of  
himself and all others similarly situated,

Plaintiffs,

vs.

INDYMAC BANCORP, INC., a Delaware  
corporation; INDYMAC BANK, F.S.B., a  
Delaware corporation; and DOES 1 through  
100, inclusive,

Defendants.

Case No. BC 378843

Assigned to: Hon. Soussan G. Bruguera  
Dept.: 71

**STIPULATION AND ORDER FOR  
SUBSTITUTION OF THE FEDERAL  
DEPOSIT INSURANCE CORPORATION,  
AS RECEIVER FOR INDYMAC BANK,  
F.S.B., AS REAL PARTY IN INTEREST**

Complaint filed: 10/09/07

**AMENDED COMPLAINT FILED: 12/14/07**

This stipulation is entered into by and among Federal Deposit Insurance Corporation (the  
“FDIC”), as the duly appointed Receiver for defendant, Indymac Bank, F.S.B. (“Indymac”), and  
Plaintiff Joel Rivera (“Plaintiff”), as follows:

WHEREAS, On July 11, 2008, the Office of Thrift Supervision closed Indymac and duly  
appointed the FDIC as Receiver;

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SUITE 2100  
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1 WHEREAS, Pursuant to Section 1821(d)(12) of the Federal Deposit Insurance Act (the  
2 "Act"), 12 U.S.C. § 1821(d)(12)(A)(ii), the Federal Deposit Insurance Corporation (the "FDIC"),  
3 was appointed Receiver for defendant, Indymac;

4 WHEREAS, Under the Act, as Receiver, the FDIC succeeds to "all rights, titles, powers and  
5 privileges of" the bank, and may "take over the assets of and operate" the bank with all the powers  
6 thereof, including the resolution of outstanding claims against the institution in receivership;

7 WHEREAS, as the real party in interest, the FDIC, as Receiver for Indymac, has stepped  
8 into Indymac's shoes for the purpose of this litigation;

9 WHEREAS, pursuant to California Code of Civil Procedure Section 368.5, where the  
10 interests of a litigant have been transferred to another entity, "the court may allow the person to  
11 whom the transfer is made to be substituted in the action or proceeding"; and


12 WHEREAS, Plaintiff has no objection to the substitution the FDIC, as Receiver for  
13 Indymac, as the real party in interest;

14 **NOW THEREFORE, THE PARTIES HEREBY STIPULATE AND AGREE**, through  
15 their respective counsel of record, that the FDIC, as Receiver, shall substitute itself for Indymac as the  
16 real party in interest and re-caption this case to reflect the same.

17 IT IS SO STIPULATED.

18 Dated: August 1, 2008

DYKEMA GOSSETT LLP

19 By:   
20 Thomas M. Hanson  
21 Attorneys for the Federal Deposit Insurance  
22 Corporation, as Receiver for Indymac Bank,  
23 F.S.B.  
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1 Dated: August 1, 2008

DAVID P. MEYER & ASSOCIATES CO., LPA

2  
3 By: 

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E-mail tahargett@mhclaw.com

21  
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23  
24 Attorneys for Plaintiff

ORDER

This matter having come before the Court by stipulation of the Parties, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT that the Federal Deposit Insurance Corporation, as Receiver, shall be and hereby is substituted for Indymac Bank, F.S.B. as the real party in interest, and that this case be re-captioned to reflect the same.

Date:

Aug. 11, 2008

AA01\216384.1  
ID\TMH

Susan Bryant Deason  
JUDGE OF THE SUPERIOR COURT

DYKEMA GOSSETT LLP  
333 SOUTH GRAND AVENUE  
SUITE 2100  
LOS ANGELES, CALIFORNIA 90071



1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 ) ss.  
4 COUNTY OF LOS ANGELES )

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 333 S. Grand Ave., 21st Fl., Los Angeles, CA 90071.

6 On August 1, 2008, I served the foregoing document described as STIPULATION AND ORDER  
7 FOR SUBSTITUTION OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR  
8 INDYMAC BANK, F.S.B., AS REAL PARTY IN INTEREST on all interested parties in this action

☐ by placing true copies thereof in sealed envelopes addressed as stated on the attached mailing list.  
☒ by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

9 **SEE ATTACHED SERVICE LIST**

10 ☒ **BY MAIL** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing on affidavit.

11 ☐ **PERSONAL SERVICE** I delivered such envelope(s) by hand to the offices of the addressee(s).

12 ☐ **OVERNIGHT COURIER** I am readily familiar with the firm's practice of collection and processing correspondence for overnight courier. On the same day that correspondence is placed for collection and delivery, it is deposited in the ordinary course of business in a sealed envelope to the addressee(s), fully prepaid, and deposited at an office or a regularly utilized drop box of the overnight delivery carrier.

13 ☐ **FACSIMILE** I caused the above referenced document to be transmitted by facsimile transmission from facsimile number (213) 457-1850 to the offices of the addressee(s) at the facsimile number(s) so indicated above. The transmission was reported as complete and without error. A copy of the transmission report issued by the transmitting facsimile machine is attached.

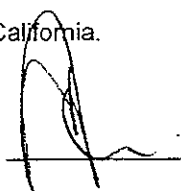
14 ☐ **E-MAIL** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) indicated above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

15 ☒ (State) I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

16 ☐ (Federal) I declare that I employed in the office of a member of the bar of this court at whose direction the service was made.

17 Executed on August 1, 2008, at Los Angeles, California.

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20  
21  
22  
23  
24  
25  
26 Caroline Acossano  
Print or Type Name

27   
Signature

DYKEMA GOSSETT LLP  
333 SOUTH GRAND AVENUE  
SUITE 2100  
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SERVICE LIST

*Joel Rivera v. Indymac Bancorp, Inc. a Delaware Corporation; Indymac Bank, F.S.B., a Delaware Corporation; etc., et al. .*  
Case No.: BC378843

Philip M. Aidikoff, Esq.  
Robert A. Uhl, Esq.  
Ryan K. Bakhtiari, Esq.  
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Attorneys for Plaintiffs Joel Rivera,  
an individual; on behalf of himself  
and all others similarly situated.

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Attorneys for Plaintiffs Joel Rivera,  
an individual; on behalf of himself  
and all others similarly situated.

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Attorneys for Plaintiffs Joel Rivera,  
an individual; on behalf of himself  
and all others similarly situated.

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ID\NAC

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SUITE 2100  
LOS ANGELES, CALIFORNIA 90071

# **EXHIBIT 3**

**SUMMONS**  
(CITACIÓN JUDICIAL)

**NOTICE TO DEFENDANT:**  
(AVISO AL DEMANDADO):

INDYMAC BANCORP, INC., a Delaware corporation;  
INDYMAC BANK, F.S.B., a Delaware corporation;  
~~DOES 1 through 100~~

RECEIVED BY  
LEGAL DEPARTMENT

NOV 07 2007  
Personal  
3:28 pm

**YOU ARE BEING SUED BY PLAINTIFF:**  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

JOEL RIVERA, an individual on behalf of himself and  
all others similarly situated

SUM-100

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**CONFORMED COPY**  
OF ORIGINAL FILED  
Los Angeles Superior Court

OCT 09 2007

John A. Clarke, Executive Officer/Clerk  
By D.M. Swain, Deputy  
D.M. SWAIN

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:  
(El nombre y dirección de la corte es):

CASE NUMBER:  
(Número del Caso):

BC378843

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

111 NORTH HILL STREET  
Los Angeles, CA

90012

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):  
RYAN K. BAKHTIARI, ESQ. (SBN 199147) (310) 274-0666/ (310) 859-0513 FAX

AIDIKOFF, UHL & BAKHTIARI

9454 WILSHIRE BOULEVARD, SUITE 303

BEVERLY HILLS, CA 90212

DATE: 10/09/07

(Fecha)

OCT 09 2007

John A. Clarke

Clerk, by

(Secretario)

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

B.M. Swain

[SEAL]

**NOTICE TO THE PERSON SERVED:** You are served

1. ☐ as an individual defendant.

2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Indymac Bancorp, Inc., a Delaware corporation

under ☒ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

4. ☒ by personal delivery on (date):

11-7-07

**CONFIRMED COPY**  
**OF ORIGINAL FILED**  
Los Angeles Superior Court

OCT 08 2007

John A. Clarke, Executive Officer/Clerk  
By *D.M. Swain*, Deputy  
D.M. SWAIN

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*Additional counsel listed on last page of Complaint*  
Attorneys for Plaintiffs

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF LOS ANGELES - CENTRAL DISTRICT**  
**UNLIMITED CIVIL CASE**

JOEL RIVERA, an individual on behalf of  
himself and all others similarly situated,

Plaintiffs,

vs.

INDYMAC BANCORP, INC., a Delaware  
corporation; INDYMAC BANK, F.S.B., a  
Delaware corporation; and DOES 1 through  
100,

Defendants.

CASE NO. **BC378843**

CLASS ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

1 Plaintiff Joel Rivera, an individual on behalf of himself and all others similarly situated  
2 brings this action against Defendants for damages and for injunctive relief resulting from their  
3 unlawful conduct in connection with residential mortgage loan transactions with Plaintiff and the  
4 Class Members. Based upon personal knowledge, information, belief and the investigation of  
5 his counsel, Plaintiff hereby alleges as follows:  
6

7 I.

8 INTRODUCTION

9 1. Individuals who decide to buy a home or refinance a home loan often obtain the  
10 assistance of a mortgage broker to obtain financing. In order to compensate the broker for  
11 services rendered in arranging a mortgage loan, the borrower agrees to pay a fee to the broker.  
12 This fee is commonly referred to as an "origination fee" or "broker fee." The fee is computed as  
13 a percentage of the loan amount and is often referred to as "points."  
14

15 2. The broker proceeds to secure a loan commitment from a lender with specific  
16 terms, including interest rate, that the lender will extend to the particular borrower. As part of  
17 that deal, the broker often secures from the lender a commitment from the lender to pay an  
18 additional fee directly to the broker that increases the interest rate on the borrower's loan. This  
19 payment from the lender to the broker is commonly referred to as a "yield spread premium,"  
20 "YSP," "rebate," "negative points," "back-end payment," as well as other names (hereinafter  
21 "YSP"). The broker and the lender often do not properly or timely disclose to the borrower the  
22 lender's YSP payment to the broker, if at all, thus depriving the borrower of a meaningful  
23 opportunity to negotiate better loan terms. The borrower unwittingly accepts a loan at an  
24  
25  
26

1 interest rate higher than what the lender would have otherwise charged for the loan in the  
2 absence of the lender's YSP payment to the broker. The YSP payment inflates the interest rate  
3 paid by the borrower for the life of the loan. The failure to disclose YSP results in damages to  
4 the borrower.  
5

6 3. Defendants IndyMac Bancorp, Inc. and IndyMac Bank, F.S.B. (collectively  
7 "INDYMAC") obtain a substantial percentage of business from the referrals of independent  
8 mortgage brokers. As is typical in the industry, the borrowers pay the brokers a fee for  
9 procuring a loan. This fee is not part of a YSP payment, but is a distinct fee properly identified  
10 as broker compensation. However, INDYMAC also often pays the broker a YSP in exchange  
11 for referring the loan at a higher than market interest rate, the more inflated the interest rate the  
12 greater the YSP payment INDYMAC makes to the broker.  
13

14 4. Defendants failure to properly and timely disclose to California borrowers the  
15 YSP payment and/or prepayment penalty until the borrower signs the final loan documents  
16 (hereinafter "closing"), if at all, takes the borrower off the market and deprives the borrower of  
17 the opportunity to secure a lower interest rate loan with INDYMAC or another lender. The  
18 damages to Plaintiff and INDYMAC's other similarly situated California borrowers are direct  
19 and substantial; the borrower pays an inflated interest payment as a direct consequence of  
20 Defendants' YSP payment to the broker and loses the opportunity to get a better deal on a loan.  
21 As to all such INDYMAC loans, INDYMAC's failure to properly and timely disclose its YSP  
22 payment to the broker constitutes a deceptive act and an unfair method of competition prohibited  
23 by California Business and Profession Code §17200. The omission in Good Faith Estimates, and  
24  
25  
26  
27



1 in some cases, HUD-1 Settlement Statements, of the fact and amount of the YSP payment is  
2 willfully misleading and in violation of the California Business and Professions Code §17500.  
3 This deceptive conduct in many instances, also violates the Federal Real Estate Settlement  
4 Procedures Act, 12 U.S.C. §§2601 *et seq.* ("RESPA") as incorporated by the California  
5 Residential Mortgage Lending Act ("CRMLA").  
6

7 5. Although the YSP payment is part of the interest on the loan, the lender pays the  
8 YSP payment to the broker at the inception of the loan. Thus, the lender pays the YSP payment  
9 to the broker before the lender actually recoups this payment from the borrower through the  
10 interest rate on the loan. The prepayment penalty ensures that if the borrower pays off the loan  
11 early without paying all of the anticipated interest, the YSP payment to the broker will be  
12 recovered by the lender. There is nothing per se illegal about prepayment penalties. What is  
13 illegal is the failure to timely and properly disclose the prepayment penalties to the borrower.  
14 State and Federal law requires that prepayment penalties be disclosed no later than 3 days after  
15 consummation of the loan. INDYMAC fails to properly and timely disclose the prepayment  
16 penalties it charges borrowers.  
17  
18

## 19 II.

### 20 JURISDICTION AND VENUE

21 6. The California Superior Court has jurisdiction over this action pursuant to  
22 California Constitution Article VI, § 10, which grants the Superior Court "original jurisdiction in  
23 all causes except those given by statute to other trial courts." The statutes under which this  
24 action is brought do not specify any other basis for jurisdiction.  
25  
26

1 7. The California Superior Court has jurisdiction over Defendant INDYMAC  
2 because it is headquartered in the State of California.

3 8. Venue is proper in the County of Los Angeles, Central District, because the  
4 named Defendants exist, transacts business, and/or have offices in this Judicial District; and/or  
5 venue is proper in this court pursuant to California Code of Civil Procedure § 395 because the  
6 acts and omissions complained of arose in this county; Plaintiff resides in this county, sustained  
7 injury to himself and/or rights inside this particular judicial district; Plaintiff is otherwise entitled  
8 to file this action in this judicial district by virtue of the causes of action being asserted; and all  
9 class actions must be filed in this district.  
10

11  
12 **III.**

13 **PARTIES**

14 9. Plaintiff Joel Rivera resides in Los Angeles County, California.

15 10. Defendant IndyMac Bancorp, Inc., a Delaware corporation is headquartered at  
16 888 East Walnut Street, Pasadena, California 91101. At all times pertinent to this action,  
17 IndyMac Bancorp, Inc. conducted and continues to conduct, business throughout the State of  
18 California.  
19

20 11. Defendant IndyMac Bank, F.S.B., a Delaware corporation is headquartered at 888  
21 East Walnut Street, Pasadena, California 91101. At all times pertinent to this action, IndyMac  
22 Bank, F.S.B. conducted and continues to conduct, business throughout the State of California.  
23

24 12. The true names and capacities, whether corporate, associate, individual or  
25 otherwise of Defendants, Does 1 through 100, inclusive are unknown to Plaintiff, who therefore  
26

1 sues said Defendants by such fictitious names pursuant to California Code of Civil Procedure  
2 §474. Each of the Defendants designated herein as a Doe is negligently or otherwise legally  
3 responsible in some manner for the events and happenings herein referred to and caused injuries  
4 and damages proximately thereby to Plaintiff and Class Members, as herein alleged. Plaintiff  
5 will ask leave of Court to amend this Complaint to show their names and capacities when the  
6 same have been ascertained.  
7

8 13. Unless otherwise indicated, each named defendant is sued as the agent and/or  
9 employee of every other named and Doe defendant acting within the course and scope of said  
10 agency and/or employment, with the knowledge and/or consent of said co-defendants.  
11

12 IV.

13 FACTS COMMON TO THE CLASS

14 14. INDYMAC engages in residential mortgage lending within the State of  
15 California. INDYMAC operates a program pursuant to which mortgage brokers refer prospective  
16 borrowers to INDYMAC.  
17

18 15. The YSP payments at issue in this case are payments from INDYMAC to  
19 mortgage brokers. INDYMAC regularly makes rate sheets available to brokers that list the  
20 terms of the loans INDYMAC offers on a particular date. Interest rates are set with reference to  
21 a particular rate sheet for use between the broker and INDYMAC. The inclusion of the YSP  
22 necessitates a higher interest rate to the borrower, i.e.: in the absence of the YSP the borrower's  
23 rate would be lower.  
24

25 16. A premium or YSP has a profound effect on the loan and on the borrower. Over  
26

1 the life of a loan, borrowers will pay thousands of dollars in interest payments more than they  
2 would have paid if no YSP payment had been paid to the broker.

3 17. The YSP must be disclosed and adequately explained to the borrower early in the  
4 transaction for the borrower to be able to determine the true cost of the loan and compare it to  
5 the loan terms offered by competitors. To that end, RESPA, the Truth in Lending Act ("TILA"),  
6 and their implementing regulations require an early and explicit disclosure of any YSP payment  
7 prior to the closing. These statutes require that the lender must provide a Good Faith Estimate  
8 that discloses any YSP to the borrower, no later than the earlier of: (1) the extension of credit; or  
9 (2) three days after the lender receives a borrower's application for a mortgage. 12 U.S.C.  
10 §2604(c), 15 U.S.C. §1638(b); 12 C.F.R. §226.19(a)(1), 24 C.F.R. §3500.7.

11 18. The failure to disclose a YSP payment in a Good Faith Estimate prior to closing  
12 violates these rules. These disclosure requirements are specifically incorporated into California  
13 law by California Financial Code §50505. In addition, RESPA requires the lender to disclose its  
14 YSP payment to the broker in the HUD-1 Settlement Statement provided to the borrower at  
15 closing. 24 C.F.R. §3500.7. Both disclosures are required to comply with the law.

16 19. The United States Department of Housing and Urban Development ("HUD"), the  
17 agency charged with regulatory oversight of RESPA, has stated with regard to the reasoning  
18 behind the disclosure requirements:

19 In HUD's view, meaningful disclosure includes many types of information: what  
20 services a mortgage broker will perform, the amount of the broker's total  
21 compensation for performing those services (including any yield spread premium  
22 paid by the lender), and whether or not the broker has an agency or fiduciary  
23 relationship with the borrower. HUD believes that disclosure of this information,  
24 and written acknowledgment by the borrower that he or she has received the  
25

1 information, should be provided early in the transaction. Such disclosure  
2 facilitates comparison shopping by the borrower, to choose the best combination  
3 of upfront costs and mortgage terms from his or her individual standpoint.

4 Real Estate Settlement Procedures Statement of Policy 2001-1, 66 Fed.Reg. 53052, 53056.

5 20. INDYMAC avoids disclosing to borrowers its YSP payments to brokers in a  
6 meaningful manner by only disclosing its YSP payment, if at all, shortly before closing and well  
7 after three days following receipt of a borrower's loan application.

8 21. Defendants' failure to disclose its premium payments in a timely fashion has  
9 harmed the Plaintiff and Class Members. Defendants' untimely disclosure deprived Plaintiff and  
10 the Class Members of material information that they could have used to bargain for better loan  
11 terms and a lower interest rate if such timely disclosure had been made. The result is that the  
12 Plaintiff and the Class have paid, and will continue to pay, more interest than they would have if  
13 Defendants had not paid the undisclosed YSP payment.  
14

15 V.

16 PLAINTIFF'S TRANSACTION

17 22. In early 2007, Plaintiff Joel Rivera sought to purchase a residence. To facilitate  
18 this purchase, Mr. Rivera contacted a mortgage broker to obtain a mortgage loan.  
19

20 23. On or about January 31, 2007, Plaintiff contacted and submitted a loan  
21 application to his mortgage broker. The broker obtained a credit report for Mr. Rivera.  
22

23 24. The broker submitted the loan to INDYMAC for a funding decision. INDYMAC  
24 quoted to Plaintiff's broker an interest rate for the loan. On or about February 8, 2007,  
25 Plaintiff's mortgage broker informed Plaintiff that his loan was approved by INDYMAC.

26 25. Plaintiff was not informed that INDYMAC was going to pay the broker a YSP  
27

1 payment in connection with the loan, how much the YSP payment would be, or the effect that  
2 the YSP payment would have on Plaintiff's interest rate. Nor was Plaintiff informed that  
3 INDYMAC would charge a substantial prepayment penalty for early payment of his loan.  
4

5 26. On or about February 24, 2007, the Plaintiff signed the final loan closing  
6 documents. The Plaintiff's Escrow on the loan closed on March 1, 2007.

7 27. Plaintiff was not provided copies of the loan documents in advance of the  
8 February 24, 2007 signing of the final closing documents.

9 28. Plaintiff was not sent copies of the documents he signed at closing until after the  
10 March 1, 2007 closing.

11 29. At closing, the actual settlement charges payable by Plaintiff totaled \$7,289.70.  
12 Defendants paid the broker a YSP payment of \$11,998.50 that was not properly or timely  
13 disclosed. The YSP paid on Plaintiff's loan caused the interest rate on Plaintiff's loan to be  
14 increased from what otherwise would have been available to him.  
15

16 VI.

17 TOLLING OF THE STATUTE OF LIMITATIONS

18 DUE TO FRAUDULENT CONCEALMENT

19 30. At all relevant times during the Class Period, Defendants fraudulently concealed  
20 the relevant facts giving rise to the claims asserted by Plaintiff and the Class, resulting in the  
21 equitable tolling of all applicable statutes of limitations.  
22

23 31. In conjunction with the mortgage loans that Defendants made to Plaintiff and the  
24 Class Members, Defendants were required to properly and timely disclose the fact and amount of  
25 all YSP payments made to the mortgage broker.  
26

33. Defendants' wrongdoing was not discoverable prior to the date of filing this Complaint since Defendants effectively concealed its YSP payment and its effect on Class Members loans by commonly omitting material information. Plaintiff exercised due diligence to discover Defendants wrongdoing by promptly filing this Complaint after discovery of the facts giving rise to these claims.

## CLASS ALLEGATIONS

34. This class action lies under California Code of Civil Procedure § 382. The Class is comprised of every California resident for whom the following is true:

- a. The resident entered (or enters) into a residential mortgage transaction or a refinance mortgage, secured by residential property located in California that was (or is) funded by INDYMAC.
- b. In connection with that transaction, INDYMAC paid the mortgage broker a YSP payment and/or included a prepayment penalty within the mortgage.
- c. In connection with that transaction, Defendant INDYMAC failed to disclose to the borrower the fact and amount of the YSP payment and/or prepayment penalty in writing on a Good Faith Estimate and/or the HUD-1 Settlement



Statement no later than the earlier of: (1) the extension of credit; or (2) three days after the lender receives a borrower's application for mortgage; and

- d. With respect to the inadequate disclosures in the Good Faith Estimate, INDYMAC received the loan application more than three days before the borrower signed the final closing documents such that INDYMAC could have informed, or caused the broker to inform the borrower of the amount of the YSP payment and/or prepayment penalty in time to reasonably allow the borrowers to make informed decisions regarding the loan.

35. Plaintiff seeks to recover damages under the California Business and Professions Code §17200 for himself and on a class-wide basis.

36. There are numerous issues of fact and law common to Members of the Class, including the following:

- a. Whether INDYMAC's failure to properly and timely disclose to borrowers the existence and amount of its YSP payment to the broker and/or prepayment penalty constitutes an unfair, deceptive, or otherwise unlawful or prohibited act;
- b. Whether INDYMAC's failure to properly and timely disclose to borrowers the existence and amount of its YSP payment to the broker and/or prepayment penalty is a business act within the meaning of the California Business & Professions Code §§ 17200;
- c. Whether INDYMAC's payment to brokers and/or prepayment penalty, creates an unlawful inducement to the broker to violate its duties under California

Financial Code §50701;

- d. Whether INDYMAC's failure to properly and timely disclose to borrowers the existence and amount of its YSP payment to the broker and/or prepayment penalty threatens an incipient violation of consumer law or violates the policy or spirit of such law or otherwise threatens or harms competition;
- e. Whether INDYMAC's wrongful acts caused Plaintiff and the Class to incur damages;
- f. Whether INDYMAC's unfair, deceptive or otherwise unlawful or prohibited business practices have allowed INDYMAC to receive and to hold ill-gotten gains belonging to members of the public; and
- g. The proper measure of damages for the Class.

37. The Plaintiff's claims are typical of the claims of the members of the Class. Like the Class, Plaintiff did not receive proper or timely notice prior to closing that a YSP would be paid by INDYMAC to the broker or that he would be subject to a substantial prepayment penalty if he refinanced or otherwise paid his loan off before a significant number of years. This information was material, as the YSP payment by INDYMAC to the broker was in exchange for an increase in the borrower's interest rate and the prepayment penalty effectively locked Plaintiff into that increased interest rate. Plaintiff and Class Members have been damaged by that failure to properly and timely disclose YSP payments to brokers and/or prepayment penalties. Moreover, Plaintiff, like each Class Member, paid an origination fee or other fee to the mortgage broker that compensated the mortgage broker for his or her services.

38. Plaintiff will fairly and adequately protect the interest of all Class Members in the

1 prosecution of this action and in the administration of all matters relating to claims stated herein.  
 2 Plaintiff is situated similarly with, and has suffered injuries identical or similar to other Class  
 3 Members. Plaintiff has also retained counsel experienced in handling class action suits involving  
 4 financial and consumer practices. Neither Plaintiff nor his counsel has any interest that might  
 5 cause them to fail to vigorously pursue this action.  
 6

7 39. A class action is superior to other available methods for the fair and efficient  
 8 adjudication of the controversy, in that:

- 9 a. The Class Members are not aware that they have been wronged and even if  
 10 they were, the value of their individual claims would make it difficult if not  
 11 impossible to prosecute individual actions.
- 12 b. Concentration of the litigation concerning this matter in this Court is  
 13 desirable.
- 14 c. The claims of Plaintiff are typical of the claims of the Class.
- 15 d. A failure of justice will result from the absence of a class action.
- 16 e. There is nothing about the Class that would render maintenance of a class  
 17 action unusually difficult and the trial of this case on a class basis will be  
 18 easily managed.  
 19  
 20

## 21 VIII.

### 22 FIRST CAUSE OF ACTION

#### 23 Violation of California Business and Profession Code §§17200, et seq.

24 40. Plaintiff realleges and incorporates by reference paragraphs 1 through 39 above.

25 41. Beginning at an exact date unknown to Plaintiff but at least as long as four years  
 26  
 27

1 prior to the filing of this Complaint and continuing to date, Defendants have committed acts of  
2 unfair competition as defined by California Business and Professions Code §17200, by engaging  
3 in the acts and practices alleged above.

4  
5 42. Defendants' failure to ensure that Plaintiff, and Class Members received proper  
6 and timely disclosure stating that Defendants would pay a YSP to the broker and/or charge a  
7 prepayment penalty in connection with their mortgage transactions, constitutes unfair and  
8 deceptive practices as defined by California Business and Professions Code §17200.

9  
10 43. By virtue of the acts and omissions alleged above, Defendants violated the duties  
11 set forth in California Financial Code §50503 and §50505.

12  
13 44. By virtue of the acts and omissions alleged above, Defendants violated  
14 prohibitions set forth in the California Financial Code §50204.

15  
16 45. Defendants caused and otherwise enticed brokers to violate the fiduciary duties  
17 owed to borrowers under California Financial Code §50701.

18  
19 46. Defendants are liable for misstatements or omissions made by mortgage brokers  
20 acting as Defendants' agent under California Financial Code §50503.

21  
22 47. Defendants' conduct threatens an incipient violation of consumer law or violates  
23 the policy and spirit of such law and otherwise significantly threatens or harms competition.

24  
25 48. Defendants' conduct affects the public interest and presents a continuing threat to  
26 the public in that it has unlawfully deceived thousands of consumers by causing them to enter  
27 into loans on unfavorable terms and, upon information and belief, continues to do so.

28 49. Plaintiff and Class Members have no other adequate remedy at law.

1 50. Plaintiff and Class Members have suffered damages as a direct and proximate  
2 result of Defendants' conduct.

3 51. Defendants' conduct was the proximate cause of the damages suffered by Plaintiff  
4 and Class Members. As a direct and proximate result of the acts alleged above, Defendants  
5 received and continue to hold ill-gotten gains belonging to members of the public.  
6

7 52. An action for injunctive relief and restitution under the Unfair Trade Practices Act  
8 is specifically authorized under California Business and Professions Code §17203. Defendants  
9 have and continue to engage in unfair competition. An order enjoining such continued unfair  
10 practices is appropriate.  
11

12 53. Accordingly, Defendants are liable to Plaintiff and Class Members for damages in  
13 an amount according to proof at trial, including attorneys' fees, costs, and exemplary damages  
14 provided by law.

15 IX.

16 SECOND CAUSE OF ACTION

17 **Violation of the California Business & Professions Code §§17500, *et seq.***

18 54. Plaintiff realleges and incorporates by reference paragraphs 1 through 53 above.

19 55. Beginning at an exact date unknown to Plaintiff but at least as long as four years  
20 prior to the filing of the Complaint and continuing to date, Defendants have committed acts of  
21 untrue and misleading advertising as defined by California Business & Professions Code  
22 §17500, by failing to disclose the prepayment penalty and/or the true compensation to be paid to  
23 borrowers' mortgage brokers and the effect of that compensation on Class Members' interest  
24 rates.  
25

26 56. The fraudulent, unlawful and unfair business practices and false and misleading  
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1 advertising of Defendants as described above presents a continuing threat to consumers in that  
2 Defendants continue to mislead mortgage borrowers to enter into loans without being given all  
3 proper disclosures in a timely manner.  
4

5 X.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays that judgement be awarded against Defendants, jointly  
8 and severally and in favor of Plaintiff and the Class for the following:

- 9 1. Actual damages;
  - 10 2. Injunctive relief as allowed by law;
  - 11 3. Restitution as allowed by law;
  - 12 4. Statutory damages as provided by California Business and Professions Code  
13 §17500 et seq.;
  - 14 5. Exemplary and punitive damages as provided by California Business and  
15 Professions Code §17500 et seq., California Code of Civil Procedure §3294 and §3295 or any  
16 other provisions allowed by law;
  - 17 6. Costs, including attorney's fees as provided by California Civil Code §1021.5 or  
18 any other provision allowed by law;
  - 19 7. Prejudgement interest thereon as provided by California Civil Code §3287 and  
20 §3288; and
  - 21 8. Such other and further relief as this Court may deem just and proper.
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**JURY TRIAL DEMAND**

Plaintiff hereby demands a jury trial on all issues so triable.

Dated: October 8, 2007

Respectfully submitted,

AIDIKOFF, UHL & BAKHTIARI

By: 

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2 (*pro hac vice* motion to be filed)  
3 Patrick G. Warner, Esq.  
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9 Telecopier (614) 224-6066  
10 Email [dmeyer@dmlaws.com](mailto:dmeyer@dmlaws.com)  
11 Email [pwarnar@dmlaws.com](mailto:pwarnar@dmlaws.com)

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28 Attorneys for Plaintiff

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 Robert A. Uhl, State Bar # 75124  
 Ryan K. Bakhtiari, State Bar # 199147  
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Attorneys for Plaintiffs

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 UNLIMITED JURISDICTION**

**FOR THE COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST**

JOEL RIVERA, an individual on behalf of  
 himself and all others similarly situated,

Plaintiff,

v.

INDYMAC BANCORP, INC., a Delaware  
 corporation, INDYMAC BANK, F.S.B., a  
 Delaware corporation and DOES 1 through 100,

Defendants.

Case No.: BC378843

**NOTICE OF CASE MANAGEMENT  
 CONFERENCE**

|               |                              |
|---------------|------------------------------|
| Action filed: | 10/08/07                     |
| CMC:          | 12/18/07, 9 a.m.             |
| FSC:          | Not set                      |
| Trial:        | Not set                      |
| Dept:         | 71, Hon. Soussan G. Bruguera |

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

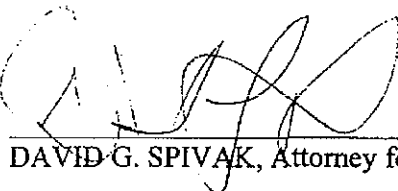
2 NOTICE IS HEREBY GIVEN that the Court, the Honorable Soussan G. Bruguera  
3 presiding, has scheduled a case management conference for December 18, 2007, at 9:00 a.m. in  
4 Department 71 at 111 N. Hill Street, Los Angeles, California 90012. The Court's Notice to  
5 Plaintiff is attached.

6 Respectfully submitted,  
7

8  
9 THE SPIVAK LAW FIRM

10  
11 Date: November 5, 2007

12 By:

13   
14 DAVID G. SPIVAK, Attorney for Plaintiffs  
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## NOTICE SENT TO:

Aidikoff, Philip M., Esq.  
Aidikoff & Uhl  
9454 Wilshire Blvd., PH Suite 303  
Beverly Hills CA 90212

**ORIGINAL FILED**  
OCT 29 2007  
LOS ANGELES  
SUPERIOR COURT

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JOEL RIVERA

Plaintiff(s),

VS.

INDYMAC BANCORP INC ET AL

Defendant(s).

CASE NUMBER

BC378843

NOTICE OF CASE  
MANAGEMENT CONFERENCE

## TO THE PLAINTIFF(S)/ATTORNEY(S) FOR PLAINTIFF(S) OF RECORD:

You are ordered to serve this notice of hearing on all parties/attorneys of record forthwith, and meet and confer with all parties/attorneys of record about the matters to be discussed no later than 30 days before the Case Management Conference.

Your Case Management Conference has been scheduled for December 18, 2007 at 9:00 am in Dept. 71 at 111 N. Hill Street, Los Angeles, California 90012.

Pursuant to California Rules of Court, 3.720-3.730, a completed Case Management Statement (Judicial Council form # CM-110) must be filed at least 15 calendar days prior to the Case Management Conference. The Case Management Statement may be filed jointly by all parties/attorneys of record or individually by each party/attorney of record. You must be familiar with the case and be fully prepared to participate effectively in the Case Management Conference.

At the Case Management Conference, the Court may make pretrial orders including the following, but not limited to, an order establishing a discovery schedule; an order referring the case to Alternative Dispute Resolution (ADR); an order reclassifying the case; an order dismissing fictitious/unnamed defendants; an order setting subsequent conference and the trial date; or other orders to achieve the goals of the Trial Court Delay Reduction Act (GC 68600 et seq.)

Notice is hereby given that if you do not file the Case Management Statement or appear and effectively participate at the Case Management Conference, the Court may impose sanctions pursuant to LASC Local Rule 7.13, CCP Sections 177.5, 575.2, 583.150, 583.360 and 583.410, GC Section 68608 (b), and California Rules of Court 2.2 et seq.

Soussan G. Bruquera

Date: October 29, 2007

Judicial Officer

## CERTIFICATE OF SERVICE

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Case Management Conference upon each party or counsel named above:

[ ] by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed herein in a separate sealed envelope to each address as shown above with postage thereon fully prepaid.

[ ] by personally giving the party notice upon filing the complaint.

Date: October 29, 2007

John A. Clarke, Executive Officer/Clerk

by C. Randle, Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**  
**NOTICE OF CASE ASSIGNMENT - UNLIMITED CIVIL CASE**  
Case Number \_\_\_\_\_

BC378843

**THIS FORM IS TO BE SERVED WITH THE SUMMONS AND COMPLAINT**

Your case is assigned for all purposes to the judicial officer indicated below (Local Rule 7.3(c)). There is additional information on the reverse side of this form.

| ASSIGNED JUDGE           | DEPT | ROOM | ASSIGNED JUDGE              | DEPT | ROOM |
|--------------------------|------|------|-----------------------------|------|------|
| Hon. Gregory Alarcon     | 36   | 410  | Hon. William F. Highberger  | 32   | 406  |
| Hon. Conrad Aragon       | 49   | 509  | Hon. Ernest M. Hiroshige    | 54   | 512  |
| Hon. Helen I. Bendix     | 18   | 308  | Hon. Jane L. Johnson        | 56   | 514  |
| Hon. Elihu M. Berle      | 42   | 416  | Hon. Ann I. Jones           | 40   | 414  |
| Hon. Tricia Ann Bigelow  | 23   | 315  | Hon. Ruth Ann Kwan          | 72   | 731  |
| Hon. Soussan G. Bruguera | 71   | 729  | Hon. Malcolm H. Mackey      | 55   | 515  |
| Hon. Susan Bryant-Deason | 52   | 510  | Hon. Rita Miller            | 16   | 306  |
| Hon. James C. Chalfant   | 13   | 630  | Hon. David L. Minning       | 61   | 632  |
| Hon. Victoria Chaney*    | 324  | CCW  | Hon. Aurelio Munoz          | 47   | 507  |
| Hon. Judith C. Chirlin   | 19   | 311  | Hon. Mary Ann Murphy        | 25   | 317  |
| Hon. Ralph W. Dau        | 57   | 517  | Hon. Joanne O'Donnell       | 37   | 413  |
| Hon. Maureen Duffy-Lewis | 38   | 412  | Hon. Yvette M. Palazuelos   | 28   | 318  |
| Hon. James R. Dunn       | 26   | 316  | Hon. Mel Red Recana         | 45   | 529  |
| Hon. Mark Mooney         | 68   | 617  | Hon. Andria K. Richey       | 31   | 407  |
| Hon. William F. Fahey    | 78   | 730  | Hon. Teresa Sanchez-Gordon  | 74   | 735  |
| Hon. Irving S. Feffer    | 51   | 511  | Hon. John P. Shook          | 53   | 513  |
| Hon. Edward A. Ferns     | 69   | 621  | Hon. Ronald M. Sohigian     | 41   | 417  |
| Hon. Kenneth R. Freeman  | 64   | 601  | Hon. Michael C. Solner      | 39   | 415  |
| Hon. Haley J. Fromholz   | 20   | 310  | Hon. Michael L. Stern       | 62   | 600  |
| Hon. Richard Fruin       | 15   | 307  | Hon. Rolf M. Treu           | 58   | 516  |
| Hon. Terry A. Green      | 14   | 300  | Hon. John Shepard Wiley Jr. | 50   | 508  |
| Hon. Elizabeth A. Grimes | 30   | 400  | Hon. Elizabeth Allen White  | 48   | 506  |
| Hon. Paul Gutman         | 34   | 408  | Hon. George Wu              | 33   | 409  |
| Hon. Robert L. Hess      | 24   | 314  |                             |      |      |
|                          |      |      | Other                       |      |      |

\*Class Actions

Given to the Plaintiff/Cross-Complainant/Attorney of Record on \_\_\_\_\_ JOHN A. CLARKE, Executive Officer/Clerk

By \_\_\_\_\_, Deputy Clerk

## **INSTRUCTIONS FOR HANDLING UNLIMITED CIVIL CASES**

The following critical provisions of the Chapter Seven Rules, as applicable in the Central District, are summarized for your assistance.

### **APPLICATION**

The Chapter Seven Rules were effective January 1, 1994. They apply to all general civil cases.

### **PRIORITY OVER OTHER RULES**

The Chapter Seven Rules shall have priority over all other Local Rules to the extent the others are inconsistent.

### **CHALLENGE TO ASSIGNED JUDGE**

A challenge under Code of Civil Procedure section 170.6 must be made within 15 days after notice of assignment for all purposes to a judge, or if a party has not yet appeared, within 15 days of the first appearance.

### **TIME STANDARDS**

Cases assigned to the Individual Calendaring Court will be subject to processing under the following time standards:

**COMPLAINTS:** All complaints shall be served within 60 days of filing and proof of service shall be filed within 90 days of filing.

**CROSS-COMPLAINTS:** Without leave of court first being obtained, no cross-complaint may be filed by any party after their answer is filed. Cross-complaints shall be served within 30 days of the filing date and a proof of service filed within 60 days of the filing date.

A Status Conference will be scheduled by the assigned Independent Calendar Judge no later than 270 days after the filing of the complaint. Counsel must be fully prepared to discuss the following issues: alternative dispute resolution, bifurcation, settlement, trial date, and expert witnesses.

### **FINAL STATUS CONFERENCE**

The Court will require the parties at a status conference not more than 10 days before the trial to have timely filed and served all motions in limine, bifurcation motions, statements of major evidentiary issues, dispositive motions, requested jury instructions, and special jury instructions and special jury verdicts. These matters may be heard and resolved at this conference. At least 5 days before this conference, counsel must also have exchanged lists of exhibits and witnesses and have submitted to the court a brief statement of the case to be read to the jury panel as required by Chapter Eight of the Los Angeles Superior Court Rules.

### **SANCTIONS**

The court will impose appropriate sanctions for the failure or refusal to comply with Chapter Seven Rules, orders made by the Court, and time standards or deadlines established by the Court or by the Chapter Seven Rules. Such sanctions may be on a party or if appropriate on counsel for the party.

**This is not a complete delineation of the Chapter Seven Rules, and adherence only to the above provisions is therefore not a guarantee against the imposition of sanctions under Trial Court Delay Reduction. Careful reading and compliance with the actual Chapter Rules is absolutely imperative.**

### **\*Class Actions**

All class actions are initially assigned to Judge Victoria Chaney in Department 324 of the Central Civil West courthouse (600 S. Commonwealth Ave., Los Angeles 90005). This assignment is for pretrial purposes and for the purpose of assessing whether or not the case is complex within the meaning of California Rules of Court, rule 3.400. Depending on the outcome of that assessment, the class action case may be reassigned to one of the judges of the Complex Litigation Program or reassigned randomly to a court in the Central District.

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/23/07

DEPT. 324

HONORABLE VICTORIA CHANEY

JUDGE E. SABALBURO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

NONE

Reporter

8:30 am BC378843

Plaintiff

Counsel

NO APPEARANCES

JOEL RIVERA

VS

Defendant

INDYMAC BANCORP INC ET AL

Counsel

NON-COMPLEX (10-23-07)

## NATURE OF PROCEEDINGS:

COURT ORDER

This Court makes its determination whether or not this case should be deemed complex pursuant to Rule 3.400 of the California Rules of Court.

This case is designated non-complex and is reassigned to Judge Soussan G. Bruguera in Department 71 at Stanley Mosk Courthouse for all further proceedings.

Court orders any complex case fee paid to be refunded.

Plaintiff is ordered to serve a copy of this minute order on all parties forthwith and file a proof of service in Department 71 within five (5) days of service.

Any party objecting to the non-complex designation must file an objection and proof of service in Department 324 within ten (10) days of service of this minute order. Any response to the objection must be filed in Department 324 within seven (7) days of service of the objection. This Court will make its ruling on the submitted pleadings.

CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER

Page 1 of 2 DEPT. 324

MINUTES ENTERED  
10/23/07  
COUNTY CLERK

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/23/07

DEPT. 324

HONORABLE VICTORIA CHANEY

JUDGE

E. SABALBURO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

NONE

Reporter

8:30 am BC378843

Plaintiff

Counsel

JOEL RIVERA

NO APPEARANCES

VS

Defendant

INDYMAC BANCORP INC ET AL

Counsel

NON-COMPLEX (10-23-07)

## NATURE OF PROCEEDINGS:

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 10-24-07 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 10-24-07

John A. Clarke, Executive Officer/Clerk

By: KIN HILAIRE  
KIN HILAIRE

AIDIKOFF, UHL & BAKHTIARI  
Philip M. Aidikoff, Esq.  
9454 Wilshire Boulevard, Suite 303  
Beverly Hills, California 90212



# **EXHIBIT 4**

1 Philip M. Aidikoff, Esq. (SB#65014)  
2 Robert A. Uhl, Esq. (SB#75124)  
3 Ryan K. Bakhtiari, Esq. (SB#199147)  
4 **AIDIKOFF, UHL & BAKHTIARI**  
5 9454 Wilshire Blvd., Suite 303  
6 Beverly Hills, CA 90212  
7 Telephone (310) 274-0666  
8 Telecopier (310) 859-0513  
9 Email [rbakhtiari@aol.com](mailto:rbakhtiari@aol.com)

10 *Additional counsel listed on last page of*  
11 *Complaint*  
12 Attorneys for Plaintiffs

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL DISTRICT

UNLIMITED CIVIL CASE

JOEL RIVERA, an individual on behalf of  
himself and all others similarly situated,

Plaintiffs,

vs.

INDYMAC BANCORP, INC., a Delaware  
corporation; INDYMAC BANK, F.S.B., a  
Delaware corporation; and DOES 1 through  
100,

Defendants.

**CONFORMED COPY**  
**OF ORIGINAL FILED**  
Los Angeles Superior Court

FILED 14 2007

John A. Clarke, Executive Officer/Clerk  
By Jalen Taylor Deputy

CASE NO. BC378843 (Assigned to the  
Honorable Soussan Bruguera)

FIRST AMENDED CLASS ACTION  
COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Plaintiff Joel Rivera, an individual on behalf of himself and all others similarly situated brings this action against Defendants for damages and for injunctive relief resulting from their unlawful conduct in connection with residential mortgage loan transactions with Plaintiff and the Class Members. Based upon personal knowledge, information, belief and the investigation of his counsel, Plaintiff hereby alleges as follows:

## I.

## INTRODUCTION

1. Individuals who decide to buy a home or refinance a home loan often obtain the assistance of a mortgage broker to obtain financing. In order to compensate the broker for services rendered in arranging a mortgage loan, the borrower agrees to pay a fee to the broker. This fee is commonly referred to as an "origination fee" or "broker fee." The fee is computed as a percentage of the loan amount and is often referred to as "points."

2. The broker proceeds to secure a loan commitment from a lender with specific terms, including interest rate, that the lender will extend to the particular borrower. As part of that deal, the broker often secures from the lender a commitment from the lender to pay an additional fee directly to the broker that increases the interest rate on the borrower's loan. This payment from the lender to the broker is commonly referred to as a "yield spread premium," "YSP," "rebate," "negative points," "back-end payment," as well as other names (hereinafter "YSP"). The broker and the lender often do not properly or timely disclose to the borrower the lender's YSP payment to the broker, if at all, thus depriving the borrower of a meaningful opportunity to negotiate better loan terms. The borrower unwittingly accepts a loan at an interest rate higher than what the lender would have otherwise charged for the loan in the absence of the lender's YSP payment to the broker. The YSP payment inflates the interest rate paid by the borrower for the life of the loan. The failure to disclose YSP results in damages to the borrower.

3. Defendants INDYMAC BANCORP, INC. and INDYMAC BANK, F.S.B. (collectively "INDYMAC") obtain a substantial percentage of business from the referrals of independent mortgage brokers. As is typical in the industry, the borrowers pay the brokers a fee for procuring a loan. This fee is not part of a YSP payment, but is a distinct fee properly identified as

1 broker compensation. However, INDYMAC also often pays the broker a YSP in exchange for  
2 referring the loan at a higher than market interest rate, the more inflated the interest rate the greater  
3 the YSP payment INDYMAC makes to the broker.

4         4. Defendants' failure to properly and timely disclose to California borrowers the YSP  
5 payment and/or prepayment penalty until the borrower signs the final loan documents (hereinafter  
6 "closing"), if at all, takes the borrower off the market and deprives the borrower of the opportunity  
7 to secure a lower interest rate loan with INDYMAC or another lender. The damages to Plaintiff and  
8 INDYMAC's other similarly situated California borrowers are direct and substantial; the borrower  
9 pays an inflated interest payment as a direct consequence of Defendants' YSP payment to the broker  
10 and loses the opportunity to get a better deal on a loan. As to all such INDYMAC loans,  
11 INDYMAC's failure to properly and timely disclose its YSP payment to the broker constitutes a  
12 deceptive act and an unfair method of competition prohibited by California Business and Profession  
13 Code §17200. The omission in Good Faith Estimates, and in some cases, HUD-1 Settlement  
14 Statements, of the fact and amount of the YSP payment is willfully misleading and in violation of  
15 the California Business and Professions Code §17500. This deceptive conduct in many instances,  
16 also violates the Federal Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* ("RESPA")  
17 as incorporated by the California Residential Mortgage Lending Act ("CRMLA").

18         5. Although the YSP payment is part of the interest on the loan, the lender pays the YSP  
19 payment to the broker at the inception of the loan. Thus, the lender pays the YSP payment to the  
20 broker before the lender actually recoups this payment from the borrower through the interest rate on  
21 the loan. The prepayment penalty ensures that if the borrower pays off the loan early without paying  
22 all of the anticipated interest, the YSP payment to the broker will be recovered by the lender. There  
23 is nothing per se illegal about prepayment penalties. What is illegal is the failure to timely and  
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1 properly disclose the prepayment penalties to the borrower. State and Federal law requires that  
2 prepayment penalties be disclosed no later than 3 days after consummation of the loan. INDYMAC  
3 fails to properly and timely disclose the prepayment penalties it charges borrowers.

## 4 II.

### 5 JURISDICTION AND VENUE

6 6. The California Superior Court has jurisdiction over this action pursuant to California  
7 Constitution Article VI, § 10, which grants the Superior Court "original jurisdiction in all causes  
8 except those given by statute to other trial courts." The statutes under which this action is brought  
9 do not specify any other basis for jurisdiction.

10 7. The California Superior Court has jurisdiction over Defendant INDYMAC because it  
11 is headquartered in the State of California.

12 8. Venue is proper in the County of Los Angeles, Central District, because the named  
13 Defendant exists, transacts business, and/or has offices in this Judicial District; and/or venue is  
14 proper in this court pursuant to California Code of Civil Procedure § 395 because the acts and  
15 omissions complained of arose in this county; Plaintiff resides in this county, sustained injury to  
16 himself and/or rights inside this particular judicial district; Plaintiff is otherwise entitled to file this  
17 action in this judicial district by virtue of the causes of action being asserted; and all class actions  
18 must be filed in this district.

## 19 III.

### 20 PARTIES

21 9. Plaintiff Joel Rivera resides in Los Angeles County, California.



1           15.     The YSP payments at issue in this case are payments from INDYMAC to mortgage  
2 brokers. INDYMAC regularly makes rate sheets available to brokers that list the terms of the loans  
3 INDYMAC offers on a particular date. Interest rates are set with reference to a particular rate sheet  
4 for use between the broker and INDYMAC. The inclusion of the YSP necessitates a higher interest  
5 rate to the borrower, i.e.: in the absence of the YSP the borrower's rate would be lower.

6           16.     A premium or YSP has a profound effect on the loan and on the borrower. Over the  
7 life of a loan, borrowers will pay thousands of dollars in interest payments more than they would  
8 have paid if no YSP payment had been paid to the broker.

9           17.     The YSP must be disclosed and adequately explained to the borrower early in the  
10 transaction for the borrower to be able to determine the true cost of the loan and compare it to the  
11 loan terms offered by competitors. To that end, RESPA, TILA, and their implementing regulations  
12 require an early and explicit disclosure of any YSP payment prior to the closing. These statutes  
13 require that the lender must provide a Good Faith Estimate that discloses any YSP to the borrower,  
14 no later than the earlier of: (1) the extension of credit; or (2) three days after the lender receives a  
15 borrower's application for a mortgage. 12 U.S.C. §2604(c), 15 U.S.C. §1638(b); 12 C.F.R.  
16 §226.19(a)(1), 24 C.F.R. §3500.7.

17           18.     The failure to disclose a YSP payment in a Good Faith Estimate prior to closing  
18 violates these rules. These disclosure requirements are specifically incorporated into California law  
19 by California Financial Code §50505. In addition, RESPA requires the lender to disclose its YSP  
20 payment to the broker in the HUD-1 Settlement Statement provided the borrower at closing. 24  
21 C.F.R. §3500.7. Both disclosures are required to comply with the law.  
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1           23. On or about January 31, 2007, Plaintiff contacted and submitted a loan application to  
2 his mortgage broker. The broker obtained a credit report for Mr. Rivera.

3           24. The broker submitted the loan to INDYMAC for a funding decision. INDYMAC  
4 quoted to Plaintiff's broker an interest rate for the loan. On or about February 8, 2007, Plaintiff's  
5 mortgage broker informed Plaintiff that his loan was approved by INDYMAC.

6           25. Plaintiff was not informed that INDYMAC was going to pay the broker a YSP  
7 payment in connection with the loan, how much the YSP payment would be, or the effect that the  
8 YSP payment would have on Plaintiff's interest rate. Nor was Plaintiff informed that INDYMAC  
9 would charge a substantial prepayment penalty for early payment of his loan.  
10

11           26. On or about February 24, 2007, the Plaintiff signed the final loan closing documents.  
12 The Plaintiff's Escrow on the loan closed on March 1, 2007.

13           27. Plaintiff was not provided copies of the loan documents in advance of the February  
14 24, 2007 signing of the final closing documents.

15           28. Plaintiff was not sent copies of the documents he signed at closing until after the  
16 March 1, 2007 closing.  
17

18           29. At closing, the actual settlement charges payable by Plaintiff totaled \$7,289.70.  
19 Defendants paid the broker a YSP payment of \$11,998.50 that was not properly or timely disclosed.  
20 The YSP paid on Plaintiff's loan caused the interest rate on Plaintiff's loan to be increased from  
21 what otherwise would have been available to him.  
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24 ///

25 ///

## VI.

**TOLLING OF THE STATUTE OF LIMITATIONS  
DUE TO FRAUDULENT CONCEALMENT**

30. At all relevant times during the Class Period, Defendants fraudulently concealed the relevant facts giving rise to the claims asserted by Plaintiff and the Class, resulting in the equitable tolling of all applicable statutes of limitations.

31. In conjunction with the mortgage loans that Defendants made to Plaintiff and the Class Members, Defendants were required to properly and timely disclose the fact and amount of all YSP payments it paid to the mortgage broker.

32. With respect to Plaintiff's loan and the loans that Defendants made to Class Members, Defendants did not disclose the fact and amount of any YSP payment, thereby concealing the payment and its effect from Plaintiff and from the Class Members. For all residential mortgage loans, Defendants concealed the effect that its YSP payments had on the borrowers' interest rate.

33. Defendants' wrongdoing was not discoverable prior to the date of filing this Complaint since Defendants effectively concealed its YSP payment and its effect on Class Members loans by commonly omitting material information. Plaintiff exercised due diligence to discover Defendants wrongdoing by promptly filing this Complaint after discovery of the facts giving rise to these claims.

## VII.

**CLASS ALLEGATIONS**

34. This class action lies under California Code of Civil Procedure § 382. The Class is comprised of every California resident for whom the following is true:

- a. The resident entered (or enters) into a residential mortgage transaction or a refinance mortgage, secured by residential property located in California that was (or is) funded by INDYMAC.
- b. In connection with that transaction, INDYMAC paid the mortgage broker a YSP payment and/or included a prepayment penalty within the mortgage.
- c. In connection with that transaction, Defendant INDYMAC failed to disclose to the borrower the fact and amount of the YSP payment and/or prepayment penalty in writing on a Good Faith Estimate and/or the HUD-1 Settlement Statement no later than the earlier of: (1) the extension of credit; or (2) three days after the lender receives a borrower's application for mortgage; and
- d. With respect to the inadequate disclosures in the Good Faith Estimate, INDYMAC received the loan application more than three days before the borrower signed the final closing documents such that INDYMAC could have informed, or caused the broker to inform the borrower of the amount of the YSP payment and/or prepayment penalty in time to reasonably allow the borrowers to make informed decisions regarding the loan.

35. Plaintiff seeks to recover damages under the California Business and Professions Code §17200 and California Civil Code §1780 for himself and on a class-wide basis.

36. There are numerous issues of fact and law common to Members of the Class, including the following:

- a. Whether INDYMAC's failure to properly and timely disclose to borrowers the existence and amount of its YSP payment to the broker and/or prepayment penalty constitutes an unfair, deceptive, or otherwise unlawful or prohibited act;

- 1           b. Whether INDYMAC's failure to properly and timely disclose to borrowers the  
2           existence and amount of its YSP payment to the broker and/or prepayment penalty is  
3           a business act within the meaning of the California Business & Professions Code §§  
4           17200;
- 5           c. Whether INDYMAC's payment to brokers and/or prepayment penalty, creates an  
6           unlawful inducement to the broker to violate its duties under California Financial  
7           Code §50701;
- 8           d. Whether INDYMAC's failure to properly and timely disclose to borrowers the  
9           existence and amount of its YSP payment to the broker and/or prepayment penalty  
10          threatens an incipient violation of consumer law or violates the policy or spirit of such  
11          law or otherwise threatens or harms competition;
- 12          e. Whether INDYMAC's wrongful acts caused Plaintiff and the Class to incur damages;
- 13          f. Whether INDYMAC's unfair, deceptive or otherwise unlawful or prohibited business  
14          practices have allowed INDYMAC to receive and to hold ill-gotten gains belonging  
15          to members of the public; and  
16          g. The proper measure of damages for the Class.

17           37. The Plaintiff's claims are typical of the claims of the members of the Class. Like the  
18           Class, Plaintiff did not receive proper or timely notice prior to closing that a YSP would be paid by  
19           INDYMAC to the broker or that he would be subject to a substantial prepayment penalty if he  
20           refinanced or otherwise paid his loan off before a significant number of years. This information was  
21           material, as the YSP payment by INDYMAC to the broker was in exchange for an increase in the  
22           borrower's interest rate and the prepayment penalty effectively locked Plaintiff into that increased  
23           interest rate. Plaintiff and Class Members have been damaged by that failure to properly and timely  
24

1 disclose YSP payments to brokers and/or prepayment penalties. Moreover, Plaintiff, like each Class  
2 Member, paid an origination fee or other fee to the mortgage broker that compensated the mortgage  
3 broker for his or her services.

4 38. Plaintiff will fairly and adequately protect the interest of all Class Members in the  
5 prosecution of this action and in the administration of all matters relating to claims stated herein.  
6 Plaintiff is situated similarly with, and has suffered injuries identical or similar to other Class  
7 Members. Plaintiff has also retained counsel experienced in handling class action suits involving  
8 financial and consumer practices. Neither Plaintiff nor his counsel has any interest that might cause  
9 them to fail to vigorously pursue this action.  
10

11 39. A class action is superior to other available methods for the fair and efficient  
12 adjudication of the controversy, in that:

- 13 a. The Class Members are not aware that they have been wronged and even if they were,  
14 the value of their individual claims would make it difficult if not impossible to  
15 prosecute individual actions.  
16  
17 b. Concentration of the litigation concerning this matter in this Court is desirable.  
18  
19 c. The claims of Plaintiff are typical of the claims of the Class.  
20  
21 d. A failure of justice will result from the absence of a class action.  
22  
23 e. There is nothing about the Class that would render maintenance of a class action  
24 unusually difficult and the trial of this case on a class basis will be easily managed.  
25  
26  
27  
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VIII.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of California Business and Profession Code §§17200, *et seq.*

40. Plaintiff realleges and incorporates by reference paragraphs 1 through 39 above.

41. Beginning at an exact date unknown to Plaintiff but at least as long as four years prior to the filing of this Complaint and continuing to date, Defendants have committed acts of unfair competition as defined by California Business and Professions Code §17200, by engaging in the acts and practices alleged above.

42. Defendants' failure to ensure that Plaintiff, and Class Members received proper and timely disclosure stating that Defendants would pay a YSP to the broker and/or charge a prepayment penalty in connection with their mortgage transactions, constitutes unfair and deceptive practices as defined by California Business and Professions Code §17200.

43. By virtue of the acts and omissions alleged above, Defendants violated the duties set forth in California Financial Code §50503 and §50505.

44. By virtue of the acts and omissions alleged above, Defendants violated prohibitions set forth in the California Financial Code §50204.

45. Defendants caused and otherwise enticed brokers to violate the fiduciary duties owed to borrowers under California Financial Code §50701.

46. Defendants are liable for misstatements or omissions made by mortgage brokers acting as Defendants' agent under California Financial Code §50503.

47. Defendants' conduct threatens an incipient violation of consumer law or violates the policy and spirit of such law and otherwise significantly threatens or harms competition.

1           48. Defendants' conduct affects the public interest and presents a continuing threat to the  
2 public in that it has unlawfully deceived thousands of consumers by causing them to enter into loans  
3 on unfavorable terms and, upon information and belief, continues to do so.

4           49. Plaintiff and Class Members have no other adequate remedy at law.

5           50. Plaintiff and Class Members have suffered damages as a direct and proximate result  
6 of Defendants' conduct.

7           51. Defendants' conduct was the proximate cause of the damages suffered by Plaintiff  
8 and Class Members. As a direct and proximate result of the acts alleged above, Defendants received  
9 and continue to hold ill-gotten gains belonging to members of the public.

10           52. An action for injunctive relief and restitution under the Unfair Trade Practices Act is  
11 specifically authorized under California Business and Professions Code §17203. Defendants have  
12 and continue to engage in unfair competition. An order enjoining such continued unfair practices is  
13 appropriate.  
14

15           53. Accordingly, Defendants are liable to Plaintiff and Class Members for damages in an  
16 amount according to proof at trial, including attorneys' fees, costs, and exemplary damages provided  
17 by law.  
18

19                                   **SECOND CAUSE OF ACTION**  
20                                   **Violation of the California Business & Professions Code §§17500, *et seq.***

21           54. Plaintiff realleges and incorporates by reference paragraphs 1 through 54 above.

22           55. Beginning at an exact date unknown to Plaintiff but at least as long as four years prior  
23 to the filing of the Complaint and continuing to date, Defendants have committed acts of untrue and  
24 misleading advertising as defined by California Business & Professions Code §17500, by failing to  
25 disclose the prepayment penalty and/or the true compensation to be paid to borrowers' mortgage  
26 brokers and the effect of that compensation on Class Members' interest rates.  
27

1           56.     The fraudulent, unlawful and unfair business practices and false and misleading  
2 advertising of Defendants as described above presents a continuing threat to consumers in that  
3 Defendants continue to mislead mortgage borrowers to enter into loans without being given all  
4 proper disclosures in a timely manner.

5                                   **THIRD CAUSE OF ACTION**  
6                                   **Violation of the Consumers Legal Remedies Act**

7           57.     Plaintiff realleges and incorporates by reference paragraphs 1 through 56 above.

8           58.     Plaintiff and Class Members are a "Person" and "Consumer" as defined by California  
9 Civil Code §1761 (c) and (d).

10          59.     Defendants are a "Person" as defined by California Civil Code §1761(c).

11          60.     All dealings between Plaintiff, Class Members and Defendants as set forth above  
12 constitute a "Transaction" as defined by California Civil Code §1761(e).

13          61.     Defendants performed "services" for Plaintiff and Class Members as defined by  
14 California Civil Code §1761(b).

15          62.     Defendants violated the provisions of the Consumer Legal Remedies Act, including  
16 but not limited to California Civil Code §§1770(1)-(3),(5),(9),(10),(14),(16),(18) and (19).

17          63.     Defendants' conduct threatens an incipient violation of consumer law and/or violates  
18 the policy or spirit of such law or otherwise significantly threatens or harms competition.

19          64.     Defendants' unlawful, unfair, and deceptive business practices as described above,  
20 present a continuing threat to members of the public. Plaintiff and other members of the general  
21 public have no other adequate remedy of law.

22          65.     Defendants' conduct was the proximate cause of the damages suffered by Plaintiff  
23 and Class Members.



66. As a direct and proximate result of the acts alleged above, Defendants received and continue to hold ill-gotten gains belonging to members of the public.

67. An action for injunctive relief under the Consumer Legal Remedies Act is specifically authorized under California Civil Code §§1780 and 1782(d).

68. If Plaintiff succeeds in enforcing these rights affecting the public interest, then attorney's fees may be awarded against Defendants pursuant to California Code of Civil Procedure §1021.5 because a significant benefit has been conferred on the general public by enjoining the Defendants from engaging in unlawful, unfair, and deceptive acts. Further, the necessity and financial burden of enforcement are such as to make such an award appropriate.

69. Pursuant to California Civil Code §1782(b), on or about November 6, 2007 Plaintiff provided written notices of Plaintiff's claims regarding violations of the Consumer Legal Remedies Act to Defendants by certified mail return receipt requested and demanded correction and rectification on or before December 6, 2007. Defendants have failed to rectify or correct the wrongs in response to the written notice provided following the expiration of a reasonable amount of time.

70. Plaintiff and Class Members have been, and continue to be damaged as a result of Defendants conduct.

71. Defendants' acts were undertaken deliberately and with intent to deceive and/or defraud thereby entitling Plaintiff and the Class to relief against Defendants in accordance with evidence presented at trial.

#### FOURTH CAUSE OF ACTION Constructive Fraud California Civil Code §1573

72. Plaintiff realleges and incorporates by reference paragraphs 1 through 71 above.

73. By reason of the fact that defendants acted as a broker and loaned money to Plaintiff and Class Members, Plaintiff and Class members reposed and placed their trust and confidence in

1 the integrity and fidelity of defendants and each of them. By virtue of their position and expertise  
2 and superior knowledge, defendants and each of them assumed fiduciary duties to Plaintiff and the  
3 Class.

4 74. Defendants owed a duty to Plaintiff and Class Members to act in the utmost good  
5 faith and in the best interest of Plaintiff and the Class. Defendant owed to Plaintiff and Class  
6 Members the highest duties of loyalty, honesty, fidelity, trust and due care in their fiduciary  
7 obligations and were required to properly and timely disclose the fact and amount of all YSP  
8 payments it paid to the mortgage broker. Defendants and each of them were required to act in a fair,  
9 just and equitable manner and to act in the furtherance of the best interest of Plaintiff and Class  
10 Members to benefit their clients, Plaintiff and Class Members, and not themselves. As a result of  
11 Plaintiff and Class Members placing their trust and confidence in defendants and each of them, a  
12 special confidential relationship was formed.

14 75. Defendants breached said duty based on their failure to properly and timely disclose  
15 the fact and amount of all YSP payments it paid to the mortgage broker.

17 76. Defendants' failure to disclose its premium payments in a timely fashion has harmed  
18 the Plaintiff and Class Members. Defendants' untimely disclosure deprived Plaintiff and the Class  
19 Members of material information that they could have used to bargain for better loan terms and a  
20 lower interest rate if such timely disclosure had been made. The result is that the Plaintiff and the  
21 Class have paid, and will continue to pay, more interest than they would have if Defendants had not  
22 paid the undisclosed YSP payment.

24 77. Plaintiff and Class Members relied on defendants and each of them to their detriment.  
25 Therefore, defendants committed a constructive fraud against plaintiffs as defined by Civil Code  
26 §1573.

79. In committing the acts described herein, defendants, and each of them, acted despicably and with a conscious disregard of plaintiffs' rights. Defendants were aware of the probable dangerous consequences of their actions and willfully and deliberately failed to avoid those consequences in that defendants misrepresented, deceived, and concealed from Plaintiff and Class Members facts known or facts that should have been known to them and acted with a conscious disregard of the rights of Plaintiff and Class Members and with the intention of thereby wrongfully inducing Plaintiff and Class Members to borrow money from defendants at inferior terms. The conduct of defendants warrants an assessment of punitive and exemplary damages in an amount appropriate to punish defendants and deter others from engaging in similar wrongful conduct.

## PRAAYER FOR RELIEF

1. Actual damages;
2. Injunctive relief as allowed by law;
3. Restitution as allowed by law;
4. Statutory damages as provided by California Business and Professions Code §17500

18

1           5. Exemplary and punitive damages as provided by California Business and Professions  
2 Code §17500 *et seq.*, California Civil Code §1780 *et seq.* and California Code of Civil Procedure  
3 §3294 and §3295;

4           6. Costs, including attorney's fees as provided by California Civil Code §1021.5,  
5 California Civil Code §1770, 1780(d) or any other provision allowed by law;

6           7. Prejudgment interest thereon as provided by California Civil Code §3287 and  
7 §3288;

8           8. Punitive damages;

9           9. Such other and further relief as this Court may deem just and proper.

10  
11 **JURY TRIAL DEMAND**

12 Plaintiff hereby demands a jury trial on all issues so triable.

13 Dated: December 14, 2007

Respectfully submitted,

14 AIDIKOFF, UHL & BAKHTIARI

15  
16  
17 By: \_\_\_\_\_

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27 Attorneys for Plaintiffs  
28

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA                    )  
   ) SS  
 COUNTY OF LOS ANGELES                )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 9454 Wilshire Boulevard, Suite 303, Beverly Hills, California 90212.

On December 14, 2007, I served the foregoing: **FIRST AMENDED COMPLAINT** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Beverly Hills, California, addressed as follows:

Naomi A. Carry, Esq.  
 Dykema Gossett, LLP  
 333 South Grand Avenue, Suite 2100  
 Los Angeles, CA 90071

Thomas M. Hanson, Esq.  
 Dykema Gossett, LLP  
 2723 South State Street, Suite 400  
 Ann Arbor, Michigan 48104

☒ (BY MAIL)

☒ I deposited such envelope with ☒ first-class ☐ certified-mail postage thereon fully prepaid in the U.S. mail at Beverly Hills, California.

☒ I am employed by Aidikoff, Uhl & Bakhtiari and am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. On said date I placed such sealed envelope(s) for collection and certified mailing following said ordinary business practice. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid for certified or first-class mail at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than 1 day after date of deposit for mailing.

☐ (BY FEDERAL EXPRESS)

☐ (BY TELECOPIER) In addition to service by mail as set forth above, the counsel by whose name an asterisk appears was also forwarded a copy of said document(s) by telecopier.

☐ (BY MESSENGER) I delivered such envelopes(s) by hand to the office(s) of the addressee(s) during regular business hours on said date.

☐ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DATED: December 14, 2007

  
 LEILA KARIMI

# **EXHIBIT 5**

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/27/08

DEPT. 1

HONORABLE Lee Smalley Edmon

JUDGE

F. MOREAU

DEPUTY CLERK

HONORABLE  
#10.

JUDGE PRO TEM

J. HERNAND, C.A.

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

BC378843

Plaintiff

Counsel

JOEL RIVERA

NO APPEARANCES.

VS

Defendant

Counsel

INDYMAC BANCORP INC ET AL

170.6 Judge Hess-Pltf

## NATURE OF PROCEEDINGS:

170.6 CCP RE-ASSIGNMENT

Good cause appearing and on order of the Court, the above matter is reassigned from Judge Robert L. Hess, Department 24, to Judge Susan Bryant-Deason in Department 52.

If any appearing party has not yet exercised a peremptory challenge under 170.6 CCP, peremptory challenges by them to the newly assigned judge must be timely filed within the 10 day period specified in Section 170.6 CCP, with extensions of time pursuant to CCP 1013 if service is by mail. Previously non-appearing parties, if any, have a 15-day statutory period from first appearance to file a peremptory challenge (68616(1) Govt. Code).

Counsel for the Defendant/moving party is to give notice to all parties.

CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 02/27/08 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the

Page 1 of 2 DEPT. 1

|   |
|---|
| MINUTES ENTERED<br>02/27/08<br>COUNTY CLERK |
|---|

228.58  
Bey



## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/27/08

DEPT. 1

HONORABLE Lee Smalley Edmon

JUDGE

F. MOREAU

DEPUTY CLERK

HONORABLE  
#10.

JUDGE PRO TEM

J. HERNAND, C.A.

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

BC378843

Plaintiff

Counsel

JOEL RIVERA

NO APPEARANCES.

Defendant

Counsel

VS

INDYMAC BANCORP INC ET AL

170.6 Judge Hess-Pltf

## NATURE OF PROCEEDINGS:

original entered herein in a separate sealed envelope  
for each, addressed as shown below with the postage  
thereon fully prepaid.

Date: February 27, 2008

John A. Clarke, Executive Officer/Clerk

By:

  
F. MOREAU

NAOMI A. CARRY, ESQ.  
DYKEMA GOSSETT LLP  
333 SOUTH GRAND AVE., STE. 2100  
LOS ANGELES, CA 90071

1 *Joel Rivera vs. Indymac Bancorp, Inc., et al.*

2 **CERTIFICATE OF SERVICE BY MAIL**

3 U.S.D.C. CASE NO.: \_\_\_\_\_

4 Superior Court Case No.: BC378843

5 I am over the age of 18 and not a party to the within action. I am employed in  
6 the County of Los Angeles, State of California by Dykema Gossett LLP. My  
7 business address is 333 South Grand Avenue, Suite 2100, Los Angeles, California  
90071-3048.

8 On September 2, 2008, I served the following entitled documents:

9 **NOTICE OF REMOVAL**

10 by placing true and correct copies thereof in sealed envelopes addressed as follows:

11 Ryan K. Bakhtiari, Esq.  
12 Philip M. Aidikoff, Esq.  
13 Robert A. Uhl, Esq.  
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Facsimile: 310.499.4739  
20 *Attorneys for Plaintiffs*

21 I am readily familiar with the firm's business practice for collection and  
22 processing of correspondence for mailing with the United States Postal Service. On  
23 this day, I placed for collection and processing the above document to be deposited  
24 with the United States Postal Service in the ordinary course of business. And in the  
ordinary course of the firm's business, such correspondence is deposited with the  
United States Postal Service the same day that it is collected.

25 I declare under penalty of perjury under the laws of the United States of  
America that the foregoing is true and correct.

26 Executed on September 2, 2008, at Los Angeles, California.

27   
28 Tonya M. Langley